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In The
Supreme Court of the United States

JAMES LARUE,

Petitioner,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; and DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE FINANCIAL SERVICES ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Hughes Aircraft Co. v. Jacobson, 105 F.3d 1288 (9th Cir. 1997), *rev'd*, 525 U.S. 432 (1999) 22

Hughes v. Legion Ins. Co., No. 03-0993, 2007 WL 781951 (S.D. Tex. March 12, 2007) 18

In re Vioxx Prods. Liability Litig., No. 1657, ___ F.Supp.2d ___, 2007 WL 2309877, (E.D. La., Aug. 14, 2007) 19

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Knieriem v. Group Health Plan, Inc., 434 F.3d 1058 (8th Cir. 2006) 28

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Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 22

Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 8, 14, 24

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Nachman v. PBGC, 446 U.S. 359 (1982) 14

Nord v. Black & Decker Disability Plan, 296 F.3d 823 (9th Cir. 2002), *rev'd*, 538 U.S. 822 (2003) 22

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 14

R.J.R. Serv., Inc. v. Aetna Cas. & Sur. Co., 895 F.2d 279 (7th Cir. 1989) 6

Sereboff v. Mid Atlantic Med. Servs., Inc., 126 S.Ct. 1869 (2006) 25, 26, 28

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Tegtmeier v. Midwest Operating Eng'rs Pension Trust, 390 F.3d 1040 (7th Cir. 2004) 10

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Todisco v. Verizon Commc'n, No. 06-1957, ___ F.3d ___, 2007 WL 2231733 (1st Cir. Aug. 6, 2007) 17

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FEDERAL STATUTES AND REGULATIONS

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29 U.S.C. § 1303(e)(1) 24

29 U.S.C. § 1451(a)(1) 24

29 C.F.R. § 2509.75-8, D-2 10

29 C.F.R. § 2510.3-1(b) 12

Revenue Act of 1978, Pub. L. No. 95-600, §135(a), 92 Stat. 2763 (1978) 10

TABLE OF AUTHORITIES – Continued

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MISCELLANEOUS

Bureau of Labor Statistics, U.S. Dept. of Labor, Employment Situation (July 2007), *available at* http://www.bls.gov/news.release/pdf/empsit.pdf 15, 16

Bureau of Labor Statistics, U.S. Dept. of Labor, National Compensation Survey: Employee Benefits in Private Industry (March 2007), *available at* http://www.bls.gov/ncs/ebs/sp/ebsm0006.pdf 15

Don Clark and Peg Brickley, *Intel's Email Recovery Effort Is Set to Cost 'Many Millions,'* WALL ST. J. April 25, 2007; Page B11 (reporting on *In re Intel Corp. Microprocessor Litig.*, No. 05-1717 (D. Del. commenced Nov. 8, 2005)) 19

DAN B. DOBBS, DOBBS LAW OF REMEDIES (West) (1993) 27

Employee Benefits Security Admin., U.S. Dept. of Labor, Private Pension Plan Bulletin Historical Tables (March 2004) *available at* http://www.dol.gov/ebsa/pdf/privatepensionplanbulletinhistoricaltables.pdf 11

Frederick L. Pilot, *Employer-Based Coverage Eroding Throughout California, New Studies Report*, 7 Pen. & Ben. Daily 134 (Pen. & Ben. Rep.) (July 13, 2007) 23

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H.R. CONF. REP. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5167, *and in* 3 LEGISLATIVE HISTORY OF ERISA 4673 (1976)..... 14

Kevin M. Scott, *Supreme Court Reversals of The Ninth Circuit,* 48 Ariz. L. Rev. 341, 341 (2006) 22

Survey Finds Massive Cost Increases for Pension Fund Liability Insurance, 30 Pens. & Ben. Rep. 1691 (BNA) (Aug. 5, 2003)..... 21

U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2006 (August 2007), *available at* http://www.census.gov/prod/2007pubs/p60-233.pdf 20

U.S. Government Accountability Office, Report to Congressional Requesters, Employee Compensation, Employer Spending on Benefits Has Grown Faster Than Wages, Due Largely to Rising Costs of Health Insurance and Retirement Benefits (February 2006), *available at* http://www.gao.gov/new.items/d06285.pdf 20

U.S. Government Accountability Office, Report to the Chairman, Committee on Education and Labor, House of Representatives, Employer-Sponsored Health and Retirement Benefits, Efforts to Control Employer Costs and the Implications for Workers (March 2007), *available at* http://www.gao.gov/new.items/d07355.pdf..... 11, 21

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William J. Wiatrowski, *Medical and Retirement Plan Coverage: Exploring The Decline In Recent Years*, MONTHLY LAB. REV., pg. 30, August 2004 16

STATEMENT OF INTEREST

This *amici curiae* brief is submitted on behalf of the Chamber of Commerce of the United States of America (the "Chamber") and the Financial Services Roundtable (collectively the "*Amici*").[1]

The Chamber is the world's largest business federation. The Chamber has an underlying membership of more than three million businesses of every size, in every industry sector and in every geographical region of the country. The Financial Services Roundtable represents 100 of the largest integrated financial services companies that provide banking, insurance and investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine, accounting directly for $65.8 trillion in managed assets, $1 trillion in revenue, and 2.4 million jobs. An important function of the Chamber and the Financial Services Roundtable is to represent the interests of their members by filing *amicus* briefs in cases involving issues of concern to the American business community. This is one such case.

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[1] In accordance with Supreme Court Rules, the *Amici* represent that no counsel for any party to this action authored this brief or made a monetary contribution to its preparation or submission. SUP. CT. R. 37.6. In addition, the *Amici* represent that the brief is filed with the consent of the parties. *See* Letter of P. Stris dated 7/27/07 and Letter of T. Gies dated 8/29/07, both of which have been filed with the Court.

Most of the *Amici*'s business members have established and continue to maintain employee benefit plans regulated by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* These members have a vital interest in the outcome of this case. If the Court of Appeals is reversed, this Court's decision would expand ERISA remedies, and thus ERISA claims, beyond the intent of the Congress as evidenced by the language of the statute. Such an expansion of ERISA remedies will increase the cost of ERISA plan administration to *Amici* members, including the cost associated with appointing and monitoring ERISA fiduciaries, and likely will force *Amici* members to cut back benefits, or decline to provide benefit improvements or benefit enhancements. Under the ERISA scheme, private sector employers can reduce non-vested ERISA benefits or choose not to offer benefit enhancements, because the statute promotes the *voluntary* establishment of benefit plans. Judicial expansion of ERISA remedies by reversing the Court of Appeals therefore would contravene the Congressional scheme in ERISA to maximize the establishment and maintenance of ERISA plans by limiting remedies.

The issues before the Court are (1) whether ERISA Section 409(a), 29 U.S.C. § 1109(a), permits an *individual*, as opposed to a *plan*, remedy, even though the statutory language permits only a plan remedy; and, (2) whether ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), permits *legal*, as opposed to *equitable*, relief, even though the statutory language does not

use the word "legal" and this Court already has definitively ruled that Section 502(a)(3) permits only equitable relief. The *Amici* have a substantial interest in the issues presented to the Court for review, and submit this brief in support of the position of Respondents on these issues.

SUMMARY OF ARGUMENT

The first issue presented for review comes to the Court in a unique procedural posture that requires the Court to accept as true the well-pled allegations in the Petitioner's Complaint. The first issue asks whether ERISA Section 502(a)(2) and Section 409(a), 29 U.S.C. §§ 1132(a)(2), 1109(a),[2] authorize a participant in a defined contribution pension plan, on behalf of himself and no other participants, to recover "lost" gains attributable to his *individual* plan account. The Complaint does not allege that Petitioner seeks relief for the *plan* and does not purport to arise under ERISA Section 502(a)(2); rather, it purports to arise only under Section 502(a)(3), 29 U.S.C. § 1132(a)(3). The threshold reason that the Court should affirm the judgment of the Court of Appeals is that the Complaint does not even place at issue ERISA Section 502(a)(2).

[2] Section 502(a)(2) expressly incorporates Section 409(a) of ERISA. 29 U.S.C. §§ 1109(a), 1132(a)(2) (2007). Section 502(a)(2) and Section 409 are used interchangeably in this brief.

Additionally, even under any attenuated reading of the Complaint, Petitioner does not seek monetary relief for his defined contribution pension *plan* – an undisputed precondition to stating a valid claim under Section 502(a)(2). The Complaint instead seeks "make whole" relief of $150,000 that would pass through the plan without any administrative processing or consideration, directly into Petitioner's individual account.[3] Brief in Opp'n, App. 4a. This Court stated in *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1 (1987), that a single benefit payment "hardly constitutes the operation of a benefit plan," because the employer does "little more than write a check." *Id.* at 12. By analogy, a single payment of $150,000 directly to an individual account would not implicate a *plan*, and thus could not constitute plan relief within the meaning of Sections 502(a)(2) and 409(a).

This Court should not countenance Petitioner's attempt to recast his Section 502(a)(3) claim in the Complaint into an unstated Section 502(a)(2) claim. He thus seeks to expand the scope of Sections 502(a)(2) and 409(a) beyond their language – an undertaking that this Court should reject.

Petitioner's attempt to rewrite Sections 502(a)(2) and 409(a) would have adverse consequences to the millions of private sector Americans who receive

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[3] In fact, Petitioner no longer has an individual account with the DeWolff, Boberg & Associates, Inc., Employees' Savings Plan. Mot. To Dismiss The *Writ* 5-6. The $150,000 would pass directly to Petitioner's personal bank account.

employee benefits from ERISA plans. The statute is carefully crafted to encourage employers to establish ERISA plans on a voluntary basis. Its remedies thus are limited in a way that Congress thought would accomplish this goal. If those remedies are expanded beyond what the statute allows, the balance set by Congress would be tipped, and fewer ERISA plans would be established or the level of benefits provided under ERISA plans would be lessened. This Court should stay true to ERISA in order to stay true to the salutary Congressional goals in ERISA.

The second issue presented for review is whether the Petitioner's Section 502(a)(3) claim for $150,000 is one for "equitable relief." Although four sections in ERISA specifically allow legal relief, Section 502(a)(3) is not one of the four, so the second issue should be resolved against the Petitioner. Indeed, this Court's decision in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993) also provides the answer to the second issue by showing that, regardless of the label Petitioner attaches to his demand for monetary relief, the $150,000 Petitioner demands is not in the possession of either Respondent and thus Petitioner's requested monetary relief is legal in nature. The Court should affirm the judgment of the Court of Appeals for the Fourth Circuit.

ARGUMENT

I. PETITIONER'S COMPLAINT SEEKS INDIVIDUAL MONETARY RELIEF AND CANNOT BE SAID TO ASSERT A CLAIM FOR PLAN RELIEF UNDER ERISA SECTION 409(A).

A. The Allegations In The Complaint And The Court's Decision In *Mass. Mutual Life Ins. Co. v. Russell* Preclude Petitioner's Ability To Seek Monetary Relief For An Individual Account Under Section 409(a).

Given the procedural posture of this case, the focus of the Court's review should be the Petitioner's Complaint.[4] The Complaint alleges that Petitioner directed the Plan through its administrators, to invest his money in the DeWolff, Boberg & Associates, Inc., Employees' Savings Plan, commonly known as a 401(k) Plan, in a certain way, but Respondents "failed

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[4] This case comes before the Court in a unique procedural posture. The District Court entered judgment for Respondents on the pleadings under FED. R. CIV. P. 12(c). Pet. Br. 11. In deciding a Rule 12(c) motion, courts "apply the same standard as that applicable to a motion under Rule 12(b)(6), accepting the allegations contained in the Complaint as true and drawing all reasonable inferences in favor of the nonmoving party." *Burnette v. Carothers*, 192 F.3d 52, 56 (2d Cir. 1999). While the Court should view the well-pled facts in the Complaint in the light most favorable to the non-moving party, the Court is "not obliged to ignore any facts set forth in the complaint that undermine the plaintiff's claim or to assign any weight to unsupported conclusions of law." *R.J.R. Serv., Inc. v. Aetna Cas. & Sur. Co.*, 895 F.2d 279, 281 (7th Cir. 1989).

to invest Plaintiff's money as directed." Brief in Opp'n, App. 3a, 12a. The Complaint further alleges that, as a result, "the Plaintiff's interest in the plan has been depleted approximately $150,000.00." *Id.* at 3a-4a. The Complaint characterizes the alleged failure to follow directions as a breach of fiduciary duty under ERISA. *Id.* at 4a. The Complaint's prayer for relief states that it seeks individual monetary relief only under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3).[5]

Ignoring his Complaint, however, Petitioner has attempted to recast his individual claim for relief under ERISA Section 502(a)(3) as a Section 502(a)(2)/ Section 409(a) claim of fiduciary breach seeking monetary relief for the plan as a whole. *See* Pet. Br. 16-29.

ERISA Section 409(a) provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities,

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[5] The Complaint's entire prayer for relief demands:

> (1) a declaration from the court that the Defendant has breached its' fiduciary duty pursuant to E.R.I.S.A. 29 U.S.C.S. § 1001 *et. seq.*, (2) for appropriate 'make whole' or other equitable relief pursuant to E.R.I.S.A. 29 U.S.C.S. § 1132(a)(3), (3) for a statutory penalty for failure to provide information Plaintiff requested pursuant to E.R.I.S.A.. 29 U.S.C.S. §1132(c), (4) for attorney's fees and costs pursuant to E.R.I.S.A. 29 U.S.C.S. § 1132(g), and [5] for such other and further relief as the court deems just and proper.

Brief in Opp'n, App. 4a. Nothing in this list of remedies seeks monetary relief for the DeWolff, Boberg & Associates, Inc., Employees' Savings Plan.

> obligations or duties imposed upon fiduciaries by this subchapter shall be personally liable *to make good to such plan* any losses *to the plan* resulting from each such breach, and to restore *to such plan* any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109(a) (2007) (emphasis added). In *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), the Court ruled that this language permits only "remedies that would protect the entire plan, rather than . . . the rights of an individual beneficiary." *Id.* at 141.

As noted, the Complaint does not allege that Petitioner seeks monetary relief under Section 409(a), nor does it allege that the Petitioner seeks to make good a loss "to the plan." Relying on *Russell*, this Court should reaffirm on this appeal that ERISA Section 409(a) will provide a claim for relief only if a plaintiff seeks relief for a plan in her complaint. Given the procedural posture of this case and the holding of *Russell*, the Court should rule that the failure of Petitioner to allege in his Complaint that he seeks relief for the plan demonstrates that Petitioner seeks individual monetary relief in this case and thus does not state a claim for monetary relief under ERISA Section 409(a).

There is another pleading deficiency in Petitioner's Complaint. The Complaint merely concludes in paragraph XIII that Respondent DeWolff, Boberg

& Associates, Inc., is a "fiduciary." Brief in Opp'n, App. 3a. However, there are no allegations of fact showing *why* it is a "fiduciary" as that term is defined in ERISA Section 3(21)(A). 29 U.S.C. § 1002(21)(A) (2007). A sufficiently particular allegation of fiduciary status is a prerequisite to state a valid claim for a fiduciary breach. *See Varity Corp. v. Howe,* 516 U.S. 489, 498 (1993) (finding that fiduciary status turns on the act or omission at issue, and not on the formal title of plan administrator); *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007) (finding that plaintiff is obligated to state in his complaint the grounds of his entitlement to relief, which "requires more than labels and conclusions"); and, *see generally, Endsley v. City of Chicago*, 230 F.3d 276, 284 (7th Cir. 2000) (stating that a plaintiff "may plead himself out of court by including factual allegations which, if true, show that his legal rights were not invaded").

Indeed, paragraph XIV of the Complaint alleges that Respondent DeWolff, Boberg & Associates, Inc., "failed to invest Plaintiff's money as *directed*. . . ." Brief in Opp'n, App. 3a-4a (emphasis added). Petitioner's Complaint thus concedes that it was he, as opposed to any fiduciary, who directed and thus controlled the investment of funds in his individual account. A person who undertakes purely ministerial functions within a framework of rules, practices and procedures does not exercise any authority or control with respect to management or disposition of the assets of the plan, and as a result, is not a fiduciary.

See 29 C.F.R. § 2509.75-8, D-2 (2006); *see also IT Corp. v. Gen. American Life Ins. Co.*, 107 F.3d 1415, 1421 (9th Cir. 1997) (noting that discretionary authority means more than the mere "power to err"); *Tegtmeier v. Midwest Operating Eng'rs Pension Trust*, 390 F.3d 1040, 1047-48 (7th Cir. 2004) (noting that misinformation by ministerial employee unique to a participant was not a fiduciary function); and *Kyle Rys., Inc. v. Pacific Admin. Serv.*, 990 F.2d 513, 516-17 (9th Cir. 1993) (noting that an insurance company is not fiduciary when it negligently administered claims under the plan). The Complaint in this case does not state a valid claim for relief under Section 409(a).

B. *Fort Halifax Packing Co. v. Coyne* Provides Additional Support Why Petitioner Does Not Seek Monetary Relief To The Plan Under Section 409(a).

Congress enacted Internal Code Section 401(k) in the Revenue Act of 1978.[6] A 401(k) plan is an "individual account plan" or "defined contribution plan" as defined in ERISA Section 3(34). 29 U.S.C. § 1002(34) (2007). A defined contribution plan, like a 401(k) plan, is a retirement plan that provides for establishment of an individual account for each plan participant. *Id.* Each plan participant's benefits under a defined

[6] Revenue Act of 1978, Pub. L. No. 95-600, § 135(a), 92 Stat. 2763 (1978) (current version at 26 U.S.C. § 401 (2007)).

contribution plan is based on the money contributed by him or by his employer on his behalf to his individual account. *Id.* This arrangement contrasts with defined benefit plans, which pay guaranteed monthly pension benefits out of aggregated plan assets and do not have individual accounts. 29 U.S.C. § 1002(35) (2007).[7] It certainly could be argued that Section 409(a) does not provide a remedy for an investment loss to an individual account occasioned by a failure to comply with a participant's investment instruction, because the monetary relief would always be allocated to the individual account, as opposed to the plan as a whole.

Alternatively, the Court could decide whether the Complaint seeks to make good a loss "to the plan" by deciding whether the plan administrator would exercise administrative discretion upon the plan's

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[7] In 1974 when ERISA was enacted, the predominant form of retirement plan was the defined benefit plan. *See* Employee Benefits Security Admin., U.S. Dept. of Labor, Private Pension Plan Bulletin Historical Tables, Table E8 (March 2004), *available at* http://www.dol.gov/ebsa/pdf/privatepensionplanbulletinhistoricaltables.pdf (noting that in 1975, of a total 38 million retirement plan participants in the United States, 27 million participated in defined benefit pension plans and 11 million participated in defined contribution pension plans). Over the years, defined contribution plans have replaced the defined benefit plan as the predominant form of ERISA retirement plans. *See* U.S. Government Accountability Office, Report to the Chairman, Committee on Education and Labor, House of Representatives, Employer-Sponsored Health and Retirement Benefits, Efforts to Control Employer Costs and the Implications for Workers, pg. 31 (March 2007), *available at* http://www.gao.gov/new.items/d07355.pdf.

receipt of money and thereby involve the plan in a meaningful way. A single, one-time payment of money to Petitioner would have no effect whatsoever on the administration and operation of the DeWolff, Boberg & Associates, Inc., Employees' Savings Plan, and thus should not be seen to constitute relief "to the plan" within the meaning of Section 409(a).

To guide this Court's analysis of whether a single, one-time payment of money, would go "to the plan," the *Amici* suggest that the Court review its reasoning in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1. In *Fort Halifax*, the Court determined that a single benefit payment "hardly constitutes the operation of a benefit plan"; rather than trigger any plan obligations or responsibilities, an employer does "little more than write a check." *Id.* at 12. The Court stated as well in *Fort Halifax* that a precondition to the establishment of an ERISA plan is a "uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits." *Id.* at 9. Similarly, the United States Department of Labor takes the view in its regulations that mere "compensation" payments are not payments by an ERISA benefit plan. 29 C.F.R. § 2510.3-1(b) (2006).

If the Complaint in this case makes any Section 409(a) allegation at all, it alleges, at most, that the DeWolff, Boberg & Associates, Inc., Employees' Savings Plan would act as a mere pass-through for any monetary relief to Petitioner. Giving every possible benefit of the doubt to Petitioner, the Complaint still

fails to allege any impact on the plan's administrative scheme or any exercise of the plan administrator's discretion in allocating $150,000 to the Petitioner. Nothing in the Complaint alleges what the Plan would do upon receipt of that money other than to pass it on *in toto* to Petitioner. The only possible inference from the Complaint is that the Plan, at most, would serve as a mere stopping point for the $150,000 requested by Petitioner, on its way to Petitioner. The monetary relief in this case thus resembles the single, one-time payment of money in *Fort Halifax*. Just as that payment did not establish an ERISA plan, so too the monetary relief of a single payment of $150,000 demanded by Petitioner is not "plan" relief. For this additional reason, the Court should find that the Complaint does not state a claim for monetary relief under ERISA Section 409(a).

II. IF PETITIONER PREVAILS, THE FOCUS OF SECTION 409(A) WOULD TURN TO INDIVIDUAL CONSEQUENTIAL DAMAGE CLAIMS AND WOULD TIP THE DELICATE CONGRESSIONAL BALANCE THAT ENCOURAGES, IN PART BY LIMITING REMEDIES, THE VOLUNTARY ESTABLISHMENT OF EMPLOYEE BENEFIT PLANS.

ERISA regulates private sector employee benefit plans. 29 U.S.C. § 1003(a) (2007). The statute's regulatory scheme does not come into play, however, unless and until, the employer voluntarily chooses to establish an ERISA plan. *See, e.g., Shaw v. Delta Air*

Lines, Inc., 463 U.S. 85, 91 (1983). To encourage employers to establish ERISA plans, Congress devised the ERISA statutory scheme to limit remedies associated with fiduciary or other breaches of ERISA standards. The legislative history of ERISA proves this point: "It is axiomatic to anyone who has worked for any time in this area that pension plans cannot be expected to develop if costs are made overly burdensome, particularly for employers who generally foot most of the bill. This would be self-defeating and would be unfavorable rather than helpful to the employees for whose benefit this legislation is designed." H.R. CONF. REP. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5167, *and in* 3 LEGISLATIVE HISTORY OF ERISA at 4673 (1976) (statement of Rep. Ullman, Member, House Comm. On Ways and Means). This statutory scheme is more than unique; it is "comprehensive and reticulated," *Nachman v. PBGC*, 446 U.S. 359, 361 (1982), and one with which this Court is "reluctant to tamper." *Russell*, 473 U.S. at 147.

In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), the Court recognized the importance of limited remedies in the ERISA statutory scheme: "[T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Id.* at 54. Likewise, in *Mertens v. Hewitt Assocs.*, the Court remarked: "ERISA is an

enormously complex and detailed statute that resolve[s] innumerable disputes between powerful competing interests – not all in favor of potential plaintiffs." 508 U.S. at 262-63. Congress clearly decided when it enacted ERISA that creating a civil enforcement scheme of specific remedies will serve the greater good of encouraging private sector employers to establish employee benefit plans and to enhance the benefits provided under those plans. Any judicial expansion of the relief permitted under Section 409(a) would tip the delicate balance struck by Congress in enacting ERISA.[8]

Upsetting that balance by expanding Section 409(a) remedies would cause severe repercussions. ERISA's scheme has generated an impressive degree of coverage in ERISA plans for tens of millions of American workers. Approximately 51% of the private sector workforce in this country, or about 64 million Americans, participate in at least one type of employer-sponsored retirement plan.[9]

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[8] As Petitioner aptly points out, expanding Section 409(a) remedies in the way he advocates not only would affect pension plans, but would also affect welfare plans: "Although this case involves a pension plan and not a welfare plan, resolution of the questions presented will likely have a significant impact on both pension *and* welfare plans." Pet. Br. 4 n. 1 (cont'd) (emphasis in original).

[9] Bureau of Labor Statistics, U.S. Dept. of Labor, National Compensation Survey: Employee Benefits in Private Industry, Table 1 (March 2007), *available at* http://www.bls.gov/ncs/ebs/sp/ebsm0006.pdf and Bureau of Labor Statistics, U.S. Dept. of

(Continued on following page)

Changes in the law of employee benefits have a real impact on the decision-making process of both employers and employees, and thus affect the success of the ERISA scheme:

> Legal changes, such as the introduction of 401(k) plans, can change the benefit packages available to employees or change the advantages employees can receive from those benefits. Changes in the law can prompt employers to offer plans or discourage them from doing so. Likewise, employees may change their decision to participate in a plan based on legal changes. For example, if a law or regulation change made it more difficult for employees to get access to funds in a defined contribution plan, they might be less inclined to participate in the plan.

William J. Wiatrowski, *Medical and Retirement Plan Coverage: Exploring The Decline In Recent Years,* MONTHLY LAB. REV., pg. 30, August 2004.

ERISA, of course, covers much more than pension plans. Its reach in the welfare benefit plan context extends to medical, surgical, hospital care, sickness, accident, disability, death, unemployment, vacation, apprenticeship, day care, scholarship and prepaid legal service plans. *See* 29 U.S.C. § 1002(1)(A)

Labor, Employment Situation, Table A (July 2007), *available at* http://www.bls.gov/news.release/pdf/empsit.pdf (as of July 2007, the employed civilian labor force totaled approximately 146 million, of which approximately 22 million were employed by the government).

(2007). In Petitioner's own words, "[t]he importance of ERISA today can hardly be overstated." Pet. Br. 4.

If the Court accepts Petitioner's position on the first issue presented for review, the delicate balance between limited remedy and voluntary establishment of plans would not endure. Section 409(a) would extend to an entirely new set of claims for individual, consequential monetary relief that otherwise would be addressed under Section 502(a)(3). For example, if Petitioner prevails, an ERISA plan beneficiary, who believes that a failure to follow instructions to designate her as a beneficiary is the fault of the plan administrator, could file a Section 409(a) action claiming that the administrator caused the consequential loss of benefits "to the plan."[10] If Petitioner prevails, an ERISA plan participant, who incurs additional taxes by virtue of the plan administrator's failure to advise him clearly of tax consequences of his decision to draw down or forego benefits, could commence a Section 409(a) action seeking to recover the value of the additional taxes incurred "to the plan."[11] If Petitioner prevails, an ERISA plan participant, who enrolls in a plan but whose insurance premium does not reach the insurance company due to an administrative oversight, could file a Section

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[10] The holding in *Todisco v. Verizon Commc'n*, No. 06-1957, ___ F.3d ___, 2007 WL 2231733, *4 (1st Cir. Aug. 6, 2007), therefore, would be implicitly overruled.

[11] The holding in *Farr v. U.S. West Commc'ns, Inc.*, 151 F.3d 908 (9th Cir. 1998), therefore, would be implicitly overruled.

409(a) action seeking the consequential damages "to the plan."[12] And, if Petitioner prevails, a 401(k) plan participant whose investment instructions are misread by an errant computer could file a Section 409(a) action claiming that the failure caused a loss "to the plan."[13]

In a case remarkably similar to the instant dispute, the Court of Appeals for the Sixth Circuit found that the participant's requested remedy – the difference between the value of his 401(k) account had his instructions been followed and the actual value of his account – constituted monetary damages and was not an equitable remedy permitted under Section 502(a)(3). *Helfrich v. PNC Bank, Kentucky, Inc.*, 267 F.3d 477, 481 (6th Cir. 2001), *cert. denied*, 535 U.S. 928 (2002). The Sixth Circuit rejected the participant's argument that he was merely seeking restitution of the benefits he could have earned had the plan fiduciary followed his instructions to invest in higher performing mutual funds. *Id.* The plan fiduciary itself had neither wrongfully retained any funds nor profited from the failure to follow the

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[12] The holding in *Hughes v. Legion Ins. Co.*, No. 03-0993, 2007 WL 781951 (S.D. Tex. March 12, 2007), therefore, would be implicitly overruled.

[13] These hypothetical examples become more likely as the baby boomer generation approaches retirement and finds that its retirement benefits do not meet its monetary needs. As this phenomenon occurs, more Americans may turn to the courts, if Petitioner prevails, with 20/20 hindsight, to correct through ERISA Section 409(a) unfortunate investment choices.

participant's instructions, and thus there was nothing to "restore" to the participant. *Id.* Petitioner's Section 409(a) argument in this case is an attempt to circumvent this and other holdings through the simple artifice of demanding in his briefs monetary relief "to the plan."

There is a cost associated with any expansion of remedies, even for non-meritorious claims. Judicial expansion of ERISA remedies beyond what Congress intended would encourage more litigation. This Court's recent decision in *Bell Atlantic Corp. v. Twombly* recognized the staggering cost and burden of modern litigation: "[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [the summary judgment stage of the] proceedings." 127 S.Ct. at 1967. The threat of discovery expense is particularly severe in light of the recent e-discovery amendments to the Federal Rules of Civil Procedure.[14] If the Court of Appeals is reversed on the first issue presented for review, the resulting expansion of ERISA Section

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[14] Electronic discovery responses easily reach millions of dollars in costs if several years' worth of archived email and files must be preserved, restored, searched and reviewed to remove non-relevant confidential material. *See, e.g., In re Vioxx Prods. Liability Litig.*, No. 1657, ___ F.Supp.2d ___, 2007 WL 2309877 (E.D. La., Aug. 14, 2007) (lamenting the burden of e-discovery on responding parties, reviewing courts, and the system of justice); *see also* Don Clark and Peg Brickley, *Intel's Email Recovery Effort Is Set to Cost 'Many Millions,'* WALL ST. J. April 25, 2007; Page B11 (reporting on *In re Intel Corp. Microprocessor Litig.*, No. 05-1717 (D. Del. commenced Nov. 8, 2005)).

409(a) remedies will impose unpredictable but substantial costs on employers and other plan sponsors.

The total compensation cost (comprising wages and benefits) for private employers already has increased as a direct result of added costs of health and retirement benefits.[15] This phenomenon has affected employer-sponsored benefit choices. "Rising health care and retirement costs affect both employers and employees. Employers may turn to using more contingent workers to whom they may not need to pay benefits and to a workforce overseas. From the employees' perspective, as the cost of benefits rises, they will be confronted with continued trade-offs in their compensation packages."[16] Indeed, according to the U.S. Census Bureau, the percentage of workers who received employment-based health insurance has steadily declined from 2000 to 2006.[17]

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[15] U.S. Government Accountability Office, Report to Congressional Requesters, Employee Compensation, Employer Spending on Benefits Has Grown Faster Than Wages, Due Largely to Rising Costs of Health Insurance and Retirement Benefits, pg. 2 (February 2006), *available at* http://www.gao.gov/new.items/d06285.pdf.

[16] *See id.* at 26.

[17] U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2006, pg. 18, and Fig. 6 at pg. 19 (August 2007), *available at* http://www.census.gov/prod/2007pubs/p60-233.pdf.

Additionally, employers hesitate to take on fiduciary responsibilities out of a fear of liability.[18] More employers are offering automatic enrollment in 401(k) plans, which can increase participation rates. However, "[s]ome experts are concerned that employers may choose low-risk default investments – which may provide inadequate returns – to avoid fiduciary liability that might be related to higher-risk investments."[19] There is a concern as well that participants often possess little financial knowledge and may not choose appropriate investments. Although some employers offer one-on-one counseling, Internet-based education and telephone hotlines, other employers choose not to offer these investment tools because of concerns of fiduciary liability.[20] Volatility in benefit costs associated with defined benefit plans also has caused employers either not to offer defined benefit plans or to freeze the plans.[21]

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[18] Fiduciary liability insurance costs have increased, in part because of increased ERISA litigation. *See Survey Finds Massive Cost Increases for Pension Fund Liability Insurance*, 30 Pens. & Ben. Rep. 1691 (BNA) (Aug. 5, 2003).

[19] *See* U.S. Government Accountability Office, Report to the Chairman, Committee on Education and Labor, House of Representatives, Employer-Sponsored Health and Retirement Benefits, Efforts to Control Employer Costs and the Implications for Workers, pg. 35 (March 2007), *available at* http://www.gao.gov/new.items/d07355.pdf.

[20] *Id.* at 36.

[21] *Id.* at 34 (Eighty-two percent of employers who froze or terminated their defined benefit plans cited cost volatility as a significant factor).

It is noteworthy that this Court has reversed the Court of Appeals for the Ninth Circuit in particular in a number of ERISA cases.[22] In one such case, *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), the Ninth Circuit expanded ERISA's remedies to hold an employer liable for a breach of fiduciary duties when it decided to amend a retirement plan and offer eligible employees incentives to accept early retirement. This Court reversed, finding that the Ninth Circuit erred when it failed to make a threshold determination whether the employer was acting as a fiduciary (which it was not) and stated that the act of amending the plan did not constitute a transfer or use of plan assets for the benefit of the employer. *Id.* at 891-92. It could be argued that the Ninth Circuit's expansion of ERISA remedies, although often reversed by this Court, has

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[22] "The frequency of the Ninth Circuit's reversals has been even greater in recent times: over the past twenty-one Supreme Court terms (since the Fifth Circuit was split), the Ninth Circuit has been reversed an average of 14.48 times, with the next closest circuit (the 'new' Fifth) reversed 5.14 times per term over the same time period." Kevin M. Scott, *Supreme Court Reversals of The Ninth Circuit*, 48 Ariz. L. Rev. 341, 341 (2006).

This record applies to the Ninth Circuit's attempt in ERISA cases to expand claims. *See, e.g., Beck v. Pace Int'l Union*, 427 F.3d 668 (9th Cir. 2005) (holding that a merger is a not permissible form of plan termination under ERISA), *rev'd*, 147 S.Ct. 2310 (2007); *Nord v. Black & Decker Disability Plan*, 296 F.3d 823 (9th Cir. 2002) (holding that courts may require plan administrators to accord special weight to treating physicians), *rev'd*, 538 U.S. 822 (2003); *Hughes Aircraft Co. v. Jacobson*, 105 F.3d 1288 (9th Cir. 1997) (holding that amending a plan implicated ERISA fiduciary duties), *rev'd*, 525 U.S. 432 (1999).

adversely affected the establishment and enhancement of ERISA plans within that Circuit. It recently has been reported, in the welfare benefit plan context, that in California more than 75% of the 6.5 million Californians who were uninsured at some point in 2005 are reported to have either worked for an employer who did not offer health benefits or were ineligible for such benefits.[23]

It is the position of the *Amici* that the Court should not judicially create remedies in Section 409(a) that do not now exist in the statute, given the dramatic, negative consequences of an expansion of remedies on the establishment and enhancement of ERISA-covered benefit plans.

III. PETITIONER'S SURCHARGE ARGUMENT CONFLICTS WITH THIS COURT'S DECISION IN *MERTENS V. HEWITT ASSOCS.* THAT CHARACTERIZES PETITIONER'S REQUESTED RELIEF AS LEGAL RELIEF.

The Complaint seeks "appropriate 'make whole' or other equitable relief pursuant to E.R.I.S.A., 29 U.S.C.S. § 1132(a)(3). . . ." Brief in Opp'n, App. 4a. Section 502(a)(3)(B)(i) allows "appropriate equitable relief to redress" a fiduciary breach. 29 U.S.C. § 1132(a)(3)(B)(i). The second question presented for

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[23] Frederick L. Pilot, *Employer-Based Coverage Eroding Throughout California, New Studies Report*, 7 Pen. & Ben. Daily 134 (Pen. & Ben. Rep.) (BNA) (July 13, 2007).

review is whether Petitioner's request for "make whole" relief seeks "equitable relief" or whether it constitutes "legal relief" not within the scope of Section 502(a)(3)(B)(i).

Four provisions in ERISA expressly allow "legal" relief: Section 502(g)(2)(E) and Section 4301(a)(1), which allow claims dealing with employer collective bargaining agreements and withdrawal liability obligations to multi-employer benefit plans, and Section 104(a)(5)(C) and Section 4003(e)(1), which allow certain Secretary of Labor and Pension Benefit Guaranty Corporation claims. 29 U.S.C. §§ 1132(g)(2)(E), 1451(a)(1), 1024(a)(5)(C) and 1303(e)(1) (2007). In the context of a very carefully crafted statute, the only reasonable inference one can draw from Congress's failure to use the word "legal" in Section 502(a)(2) and Section 502(a)(3) and its use of that word in four other sections not at issue here is that Congress did not intend to provide legal relief under Section 502(a)(3). That inference is supported by ERISA's legislative history, which shows that an earlier version of Section 409(a) allowed "legal or equitable" relief and was amended to delete the word "legal." *See Russell*, 473 U.S. at 145-46 & n. 14 (citing legislative history).

In keeping with this reasonable inference, this Court already has answered the second issue presented for review in *Mertens v. Hewitt Assocs.*, 508 U.S. 248. The allegations in the complaint in *Mertens* were strikingly similar to those in the Complaint in this case. The *Mertens* plaintiffs sued a non-fiduciary

who allegedly participated in a fiduciary breach under Section 502(a)(3): "Petitioners contend that requiring respondent to make the Kaiser plan whole for the losses resulting from its alleged knowing participation in the breach of fiduciary duty by the Kaiser plan's fiduciaries would constitute 'other appropriate equitable relief' within the meaning of § 502(a)(3)." 508 U.S. at 253.[24] This Court reasoned: "Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory *damages* – monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of *legal* relief." *Id.* at 255 (emphasis in original). In this case, Petitioner likewise seeks compensatory damages for a loss sustained as a result of an alleged breach of fiduciary duties. It is impossible to characterize Petitioner's request for monetary relief in any other way, since his Complaint expressly seeks "make whole" monetary relief.

The Court's more recent decisions in *Great-West Life & Annuity Ins. Co., v. Knudson*, 534 U.S. 204 (2002) and *Sereboff v. Mid Atlantic Med. Servs., Inc.*, 126 S.Ct. 1869 (2006), confirm that Petitioner seeks legal, and not equitable, relief when he demands "make whole" money. In *Great-West*, the Court reasoned that whether a demand for money is legal or

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[24] The *Mertens* plaintiffs did not sue for relief under Sections 409(a) and 502(a)(2) because they sued nonfiduciaries, which are not proper defendants under those sections.

equitable "depends on the basis for the plaintiff's claim *and the nature of the underlying remedies sought*." *Id.*, 534 U.S. at 213 (quotation marks and brackets omitted; emphasis added). The Court added that a plaintiff could seek money as an equitable remedy "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* In *Sereboff*, the Court reiterated that monetary equitable relief is a function of the court's ability to impose a constructive trust or equitable lien on particular funds or property in the defendant's possession. *Id.*, 126 S.Ct. at 1874. The Complaint in this case does not seek to recover any money or property in Respondents' possession; indeed, it acknowledges that no such money or property exists, as the Complaint seeks to recover money equal to a lost investment opportunity (as opposed to money that the defendant took from the plan, or money that defendant earned from money taken from the plan). The claim in *Great-West* was "not that respondents *hold* particular funds that, in good conscience, belong to petitioners," *id.*, 534 U.S. at 214 (emphasis added), or that "identifiable funds (or property) belonging to the plaintiff and held by the defendant," *id.* at 216, and the claim in this case is not that Respondents hold any identifiable money that belongs to Petitioner.

That Petitioner labels his requested monetary relief "surcharge" is of no moment. Petitioner concedes that his definition of "surcharge" "may superficially appear akin to compensatory damages," Pet. Br.

37, but the resemblance is more than superficial. Petitioner argues that surcharge is equitable because it can be described as "restitutionary." *Id.* The remedy of equitable restitution, however, can apply only if a defendant holds particular funds that in good conscience belong to a plaintiff.[25] Respondents in this case do not possess any property or ill-gotten profits to return to the Petitioner. Lack of possession was the precise reason why petitioner in *Great-West* could not recover, and the same reasoning must apply in this case: "The basis for petitioners' claim is not that respondents hold particular funds that, in good conscience, belong to petitioners, but that petitioners are contractually entitled to *some* funds for benefits

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[25] This Court has defined "equitable relief" by reference to DAN B. DOBBS, DOBBS LAW OF REMEDIES (West) (1993). *Great-West*, 534 U.S. at 213. DOBBS cannot be read to view "surcharge" as equitable relief distinct from equitable restitution and constructive trust. "In the constructive trust case the defendant has legal rights to something that in good conscience belongs to plaintiff. The property is 'subject to a constructive trust,' and the defendant is a 'constructive trustee.' The defendant is thus made to transfer title to the plaintiff who is, in the eyes of equity, the true 'owner.'" DOBBS, § 4.3(1).

> When equity imposes a constructive trust upon an asset of the defendant, the plaintiff ultimately gets formal legal title. The effect is to allow the plaintiff to recover the asset in specie. For instance, the plaintiff may recover legal rights to Blackacre itself, or a particular bank account, or rights in an intangible such as a trademark, *not merely a money judgment equal to the value of such assets.* If the asset has increased in value, the plaintiff gets the increase.

Id. § 4.3(2) (emphasis added).

that they conferred." 534 U.S. at 715 (emphasis in original).[26]

Following *Mertens*, *Great-West* and *Sereboff*, Petitioner is wrong to urge this Court to recognize surcharge as an equitable remedy "notwithstanding any compensatory purpose it may serve." Pet. Br. 40. If the Court accepts Petitioner's attempt to recast his request for legal relief by calling it "surcharge," the Court would be rejecting the reasoning of these three of its prior decisions.

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[26] The Court of Appeals for the Eighth Circuit has rejected a "surcharge" argument like that of the Petitioner, in *Knieriem v. Group Health Plan, Inc.*, 434 F.3d 1058 (8th Cir. 2006). In an attempt to recast his request for compensatory damages, plaintiff there had argued (without success) that Section 502(a)(3) permits a monetary "surcharge" upon the fiduciary for his breach and therefore is a form of an equitable relief permitted by ERISA.

CONCLUSION

The Court should affirm the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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